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**National Stores, Inc. d/b/a Factory 2-U and Abigail Martinez.** Case 28–CA–231771

December 9, 2020

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND  
MCFERRAN

The General Counsel seeks a default judgment in this case on the ground that National Stores, Inc. d/b/a Factory 2-U (the Respondent) has failed to file an answer to the complaint. Upon a charge filed by Abigail Martinez on November 26, 2018, the General Counsel issued a complaint and notice of hearing on May 29, 2020, against the Respondent, alleging that it has violated Section 8(a)(1) of the Act. The Respondent failed to file an answer.

On September 28, 2020, the General Counsel filed with the National Labor Relations Board a Motion for Default Judgment. On September 29, 2020, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On October 27, 2020, the Board issued a Supplemental Notice to Show Cause, attempting service on the Respondent at an additional address. The Respondent filed no response to either notice. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

**Ruling on Motion for Default Judgment**

Section 102.20 of the Board's Rules and Regulations provides that the allegations in a complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively states that unless an answer is received on or before June 12, 2020, the Board may find, pursuant to a motion for default judgment, that the allegations in the complaint are true. Further, the undisputed allegations in the General Counsel's

motion disclose that the Region, by letter dated July 24, 2020 (which enclosed a copy of the complaint), advised the Respondent that unless an answer was received by July 31, 2020, a motion for default judgment would be filed; and, by letter dated August 20, 2020 (which enclosed a copy of the complaint), advised the Respondent that unless an answer was received by August 27, 2020, a motion for default judgment would be filed. Nevertheless, the Respondent failed to file an answer.<sup>1</sup>

In the absence of good cause being shown for the failure to file an answer, we deem the allegations of the complaint to be admitted as true, and we grant the General Counsel's Motion for Default Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent has been a corporation with an office and place of business in Nogales, Arizona (the Respondent's facility), and has been engaged in the business of operating a retail store.

During the 12-month period ending November 26, 2018, the Respondent, in conducting its operations described above, purchased and received at its facility goods valued in excess of \$50,000 directly from points outside the State of Arizona, and derived gross revenues in excess of \$500,000.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of the Respondent within the meaning of Section 2(11) of the Act and agents of the Respondent within the meaning of Section 2(13) of the Act:

Lisa Hill	-	District Manager
Susana Mitschke	-	Store Manager
Kendra Galaviz	-	Supervisor

<sup>1</sup> The General Counsel's motion for default judgment and attached exhibits indicate that the July 24 reminder letter, sent by regular mail to the Respondent's facility in Nogales, Arizona, was returned on August 5 with a U.S. Postal Service notation indicating that delivery had been attempted but was not successful for an unknown reason. The General Counsel sent the August 20 reminder letter by regular mail to the Respondent's facility and to an additional address at 15001 S. Figueroa Street, Gardena, California. This California address was listed as the Respondent's address in the California Secretary of State records, and as the address for FP Stores, Inc., owner of the trade name Factory 2-U, in the Arizona Corporation Commission records. On August 26, the letter sent to the Respondent's facility was returned to the General Counsel as

"temporarily away" and "unable to forward." However, the letter sent to the California address was not returned as undeliverable.

It is well settled that a respondent's failure or refusal to accept certified mail or to provide for appropriate service cannot serve to defeat the purposes of the Act. See, e.g., *Cray Construction Group, LLC*, 341 NLRB 944, 944 fn. 5 (2004); *I.C.E. Electric, Inc.*, 339 NLRB 247, 247 fn. 2 (2003). Further, the failure of the postal service to return documents served by regular mail indicates actual receipt of those documents by the Respondent. *Id.*; *Lite Flight, Inc.*, 285 NLRB 649, 650 (1987), *enfd.* sub nom. *NLRB v. Sherman*, 843 F.2d 1392 (6th Cir. 1988).

The following events occurred, giving rise to this proceeding.

1. (a) From about December 2017 through about November 15, 2018, the Respondent's employee Martinez engaged in concerted activities with other employees for the purposes of mutual aid and protection by, among other ways, discussing concerns about the Respondent not paying its employees for all hours worked and denying its employees from taking their lunch breaks, and bringing those concerns to the Respondent.

(b) About the last week of September 2018 or the first week of October 2018, a more precise date being unknown to the General Counsel, the Respondent, by Kendra Galaviz, at the Respondent's facility, threatened its employees by telling them not to contact upper-level management because they engaged in concerted activities.

(c) About the first week of November 2018, a more precise date being unknown to the General Counsel, the Respondent reduced the work hours of its employee Martinez.

(d) About the first week of November 2018, a more precise date being unknown to the General Counsel, the Respondent changed the work schedule of its employee Martinez.

(e) About November 21, 2018, the Respondent discharged its employee Martinez.

2. The Respondent engaged in the conduct described above in paragraphs 1(c) through 1(e) because Martinez engaged in the conduct described above in paragraph 1(a), and to discourage employees from engaging in these or other concerted activities.

#### CONCLUSIONS OF LAW

By the conduct described above in paragraph 1, the Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act. The unfair labor practices of the Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(1) by discharging employee Abigail Martinez for engaging in protected concerted activity, we shall order the Respondent to reinstate Martinez and make her whole for any loss of earnings and other benefits suffered as a result of the unlawful discrimination against her. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB

289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

In accordance with our decision in *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. in relevant part 859 F.3d 23 (D.C. Cir. 2017), we shall also order the Respondent to compensate Martinez for her search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

Having found that the Respondent unlawfully reduced the hours worked by Martinez, we shall order the Respondent to make her whole for any losses suffered as a result of the reduction in her hours in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

In addition, we shall order the Respondent to compensate Martinez for any adverse tax consequences of receiving a lump-sum backpay award and to file a report with the Regional Director for Region 28 allocating the backpay award to the appropriate calendar years. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

The Respondent shall also be required to remove from its files any reference to the unlawful discharge of Martinez and to notify her in writing that this has been done and that the unlawful discharge will not be used against her in any way.

#### ORDER

The National Labor Relations Board orders that the Respondent, National Stores, Inc. d/b/a Factory 2-U, Nogales, Arizona, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Threatening employees by telling them not to contact upper-level management because they engage in protected concerted activities.

(b) Reducing the work hours of employees because they engage in protected concerted activities and to discourage other employees from engaging in these activities.

(c) Changing the work schedules of employees because they engage in protected concerted activities and to discourage other employees from engaging in these activities.

(d) Discharging or otherwise discriminating against employees because they engaged in protected concerted

activities and to discourage other employees from engaging in these activities.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Abigail Martinez full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Abigail Martinez whole for any loss of earnings or benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of this decision.

(c) Make Abigail Martinez whole for any loss of earnings or benefits suffered as a result of the unlawful reduction of her work hours, in the manner set forth in the remedy section of this decision.

(d) Compensate Abigail Martinez for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Abigail Martinez, and within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Post at its facility in Nogales, Arizona, copies of the attached notice marked "Appendix."<sup>2</sup> Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and

maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since the last week of September 2018.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 28 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 9, 2020

John F. Ring, Chairman

Marvin E. Kaplan, Member

Lauren McFerran Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

## APPENDIX

### NOTICE TO EMPLOYEES

### POSTED BY ORDER OF THE

### NATIONAL LABOR RELATIONS BOARD

### An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

<sup>2</sup> If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting

of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

**FEDERAL LAW GIVES YOU THE RIGHT TO**

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT threaten you by telling you not to contact upper-level management because you engage in protected concerted activities.

WE WILL NOT reduce the work hours of any of you because you engage in protected concerted activities and to discourage other employees from engaging in these activities.

WE WILL NOT change the work schedules of any of you because you engage in protected concerted activities and to discourage other employees from engaging in these activities.

WE WILL NOT discharge or otherwise discriminate against any of you because you engage in protected concerted activities and to discourage other employees from engaging in these activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Abigail Martinez full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Abigail Martinez whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, less any net interim earnings, plus interest, and WE WILL also make her whole for reasonable

search-for-work and interim employment expenses, plus interest.

WE WILL make Abigail Martinez whole for any loss of earnings and other benefits suffered as a result of our unlawful reduction in her hours of work, plus interest.

WE WILL compensate Abigail Martinez for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to our unlawful discharge of Abigail Martinez and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

NATIONAL STORES, INC. D/B/A FACTORY  
2-U

The Board's decision can be found at [www.nlr.gov/case/28-CA-231771](http://www.nlr.gov/case/28-CA-231771) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

